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WASHINGTON DC, MARCH 25-29, 2019



An analysis of dispute resolution systems as a means to fighting land corruption and promotion of access to justice – the case of Kenya, Ghana and Zimbabwe

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**Paper prepared for presentation at the
“2019 WORLD BANK CONFERENCE ON LAND AND POVERTY”
The World Bank - Washington DC, March 25 - 29, 2019**

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Abstract

Many challenges bedevil the justice system in countries, thus leading to protracted resolution of land cases. These challenges not only fuel land corruption, but lead to immense violation of land rights. This paper seeks to analyse dispute resolution mechanisms as a means to fighting land corruption and promoting access to justice. It asserts the need to examine the legal, institutional reforms and progress made towards making access to justice for all a reality. It further proposes mapping out the existing formal and informal land dispute resolution mechanisms, strengthening their capacity and enhancing transparency and accountability in discharging their mandate.

Through analyzing case studies in Kenya, Ghana and Zimbabwe, the paper is framed within the nuances of Goal 16 of the Sustainable Development Goals on promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and build effective, accountable and inclusive institutions at all levels.

Keywords: Accountability; Corruption; Dispute Resolution; Justice; Land Corruption



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Introduction

The right to free legal aid for citizens who are unable to afford legal representation is a trite principle of law and an essential component of the right to a fair trial. Legal aid provides a foundation for a fair and effective justice system based on the rule of law. In line with the International Covenant on Civil and Political Rights (ICCPR)¹ and the UN Principles and Guidelines², many countries, have enacted laws that provide for and guarantee the right to free legal representation for indigent and vulnerable persons. The Sustainable Development Goals give particular emphasis to land rights, urban land and corruption, particularly Goal 16: Peace, justice and strong institutions Promote peaceful and inclusive societies... provide access to justice for all. Targets include substantially reducing corruption and bribery and developing effective, accountable and transparent institutions, among others.

However, the challenge in many countries remains in implementing the right to legal aid at no cost for those without sufficient means, or as the interests of justice so require. The status quo on access to justice, in many African countries, has been characterised by limited resource allocation for legal aid services, and insufficient number of legal aid providers, who frequently lack training on how to deliver effective legal aid services, or failure by citizens to appreciate their right to legal aid.

In their quest to access justice on land cases, it has been observed that most vulnerable communities (marginalised groups including women, persons with disability and the indigent) in Kenya, Ghana and Zimbabwe, encounter immense challenges that bedevil the justice sector. These are characterised by legal, social, cultural, institutional, structural, procedural, political and economic challenges that make it either substantively or technically difficult to access justice. Notably, land cases in their very nature are quite technical and complex hence require legal expertise that can only be availed through legal representation or some form of capacity building. Overlapping and sometimes opposing customary and statutory legal frameworks in these countries make it difficult for these vulnerable groups to understand what their rights are or how to negotiate a path to justice in relation to land disputes. With the background in mind, these circumstances impede justice in the face of violation of rights in the land sector, and more so, fuel land corruption.

Traditional chiefs or leaders, also increasingly engage in unscrupulous land deals with investors or other agents, by selling land which they are supposed to hold in trust to the community or to the state, causing landlessness among communities. Other land conflicts result from the multiple sales and

¹ Ratified by Kenya on 1st May, 1972

² UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems Available at https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf (Last accessed 18th March 2019)



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double allocation of land, either because of undocumented customary tenure, or because of duplication of roles amongst state agencies who feel they are mandated to do so.

The discussion below thus reiterates the need to facilitate access to justice in land corruption cases, explores the challenges experienced in the quest to achieve justice; with perspectives drawn from Kenya, Ghana and Zimbabwe. It also sheds light on use of alternative dispute mechanisms as a viable tool in resolving land conflicts, looking at some of the related challenges and opportunities.

LAND CORRUPTION DEFINED

Corruption in the land sector is therefore the abuse of power and authority by those in charge of land administration for their own gain or benefit (Mutondoro and Ncube, 2013)

Through its empirical and desk-based baseline survey (2015-2016) on land corruption in Cameroon, Ghana, Kenya, Madagascar, Sierra Leone, Uganda, Zambia, and Zimbabwe, Transparency International identified a number of issues that would have to be tackled to increase a nation's capacity to counteract land corruption:

- Inadequate access to information, which allows citizens to knowing their rights and how to make use of them;
- Complex laws and procedures regulating land ownership and insufficient access to justice (multiple laws, gaps in legislation, traditional versus formal laws and institutions, uncertain law-enforcement);
- Deficient citizen participation in decision making and monitoring on land transactions, so that there is free, prior, informed consent;
- Unaccountable land management and urban land planning in the context of rapid urbanization that deprives the public purse of essential revenues and makes tenure and shelter security for the urban poor unobtainable;
- Absence of efficient anti-corruption oversight and restriction mechanisms, with grievance mechanisms, in the land sector;
- Insufficient capacity in local administration and traditional institutions to support good land governance;
- Perceived lack of incentives / win-win-situations for different stakeholders to act with integrity in land governance;
- Opacity of private sector / government land deals and the resulting difficulties in investigating and understanding the drivers behind these deal



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Conflicts between the state legislation and customary laws under which traditional leaders are often custodians of the land (as in Ghana, Kenya, Uganda, Zambia) even where individual ownership is recognized. The recognition of customary law can be empowering for communities but it becomes a source of confusion and frustration in cases where state law and customary laws are contradictory. Limited accountability of traditional leaders is a corruption risk with potential for systematic intimidation, bribery, extortion or nepotism.

The Dynamics of Public Private Relations: Grand corruption in the land sector is a specific case of political corruption as it does not only stipulate the loss of state resources and the misappropriation of public and private resources but directly impacts the population through a dramatic loss of stability for those affected. Resettlement policies and the danger of land-grabbing and eviction from owned or cultivated properties is the most feared consequence of opaque public-private dynamics.

Grievance Mechanisms: The biggest challenge in as far as complaint mechanisms is concerned is lack of awareness on dispute resolution mechanisms linked to land issues. Grievance mechanisms and cycles of judiciary appeal exist in almost all countries but are largely inefficient because they are too costly or too specialized. The low accountability of traditional leaders poses a challenge as customary laws have different complaint mechanisms and grievance provisions from state legislation.

Lack of Information related to Land: Information on land issues, especially land deals, land planning and land management is provided for in law, although inaccessible to communities. Different channels of communication exist in different countries but all have in common their inaccessibility to the populations. The communities are not sufficiently aware of the land acquisition projects that concern them and often remain unaware of the risks linked to new land planning schemes. The only time they would be aware of the large scale land transactions would be when violations happen.

KENYA

Kenya has an area of approximately 582,646 sq. Km. Nearly 80% of the land is arid or semi-arid. This means that agricultural potential is limited to about 20% of the land. The population density in these areas with high agricultural potential is estimated to be 2000 persons per sq. Km. Recent statistics



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have put absolute poverty in rural areas at 54% of the population and 53% in the urban areas. With high unemployment rates, this means that a huge majority of Kenyans are wholly dependent on land for sustenance and their livelihoods. This has led to unprecedented competition for dwindling resources tied to land. In fact, the National Land Policy (2009) itemized the issues facing the country as deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict. In the recent past, the country has suffered from alienation of large swathes of indigenous peoples' land for mining,³ large scale farming⁴ and land intensive capital projects.⁵

Land is a key driver of socio-economic development in the society and the country at large. It is also considered as an important aspect of the life of any society. It has been characterised for its importance such as food production and security, supporting biological resources and processes, sustaining livelihoods, and constituting an important cultural heritage for many communities. Individuals, communities and organizations have over the years embarked on investing in land. With the increased levels of investments, the state of affairs has not only encouraged land grabbing, but also led to various malpractices that amount to corruption in the land sector (land corruption). But what then is land corruption?

As a result, conflicts have been increasingly acknowledged, a critical factor to the attainment of secure land tenure rights, development, peace-keeping and peacebuilding. In addition, cases emanating from these conflicts have been dragging in courts for years. People are now tired of going to courts to seek redress and justice. However, on deep interrogation of the issues at hand, there is a clear co-relation between management systems of land, lack of transparency and accountability and the resultant land problems. The land issues in the country are not merely a management issue and neither are they just mere 'talk'. Kenya generally has a history of settler colonialism, labour migration, and land dispossession characterized in the pre-independence period and perhaps even currently by a highly capital intensive settler-owned agricultural land sitting side by side with overcrowded rural reserves or community areas.

The colonial tenure system commercialized indigenous land, denying locals their citizenship, livelihoods and dignity. For this reason, common Kenyans are to date still seeking for land tenure that will guarantee them a source of citizenship, justice and most important- some minimum protection against those who rule the marketplace.

³ Mining projects include Titanium mining in Kwale, coast region and coal mining in Kitui, eastern region.

⁴ One of the projects includes the Galana-Kulalu Ranch which has about 1000 Ha under irrigation.

⁵ This includes projects such as the standard gauge railway and the Lamu Port project.



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Globally, according to Transparency International's (TI) Global Corruption Barometer 2013, one in five people reported that they had paid a bribe for land services in the year 2013⁶. In its Land Matrix⁷, the Land Observatory Group documented 862 concluded land deals since 2000, amounting to 31.5 million ha of land globally, of which more than 40% are acquired in Africa (378 land deals). A comparison between information on the Land Matrix and TI's Corruption Perception Index (CPI) results shows that the number of land deals are higher in countries with a relatively low CPI score (e.g. Madagascar, Mali, Mozambique), and lower or non-existent in countries with a higher score (e.g. Botswana, Ghana), where corruption is perceived as relatively less prevalent.

Closer home, the East African Bribery Index 2014 ranked land services in Kenya as the second highest in the average size of bribe paid. In terms of the likelihood of encountering bribery, land services were leading with respondents having a 17% chance of encountering corruption. In the aggregate index for Kenya, land was ranked second with a score of 55.0 rising by 8.3 from 46.7 from 2013.

Land deals negatively affect the customary users of land. In Africa, a large portion of arable land is in tenure by small-scale farmers, who often are women, who are the largest users of land and the biggest factor of production in agriculture. Women in Kenya comprise 70% of the agricultural labour force. Despite this, only a small percentage of them have secure rights with regards to access to land. Large proportions of savannah and semi-desert land is in tenure by pastoralists and indigenous communities. Each land deal – whether transparent or opaque - deprives customary land users of two of their most relevant resources: land and water.

Respecting land and tenure rights – whether traditional, customary or modern – is thus the basis for good land governance in Africa. Land governance brings together men and women as users and producers on land, and the state; as a service provider to its citizens and the enabler and protector of their prosperity. If the state is corrupt, and laws to protect citizens' rights do not exist or are not enforced, land governance and land rights fail. In that case, the livelihoods of men and women whose prosperity is based on secure access to land are severely undermined. As women and indigenous communities in Africa often depend heavily on land as a resource and as they have a strong socio-cultural relationship to land, they are especially affected and discriminated by lack of transparency in land governance and the lack of opportunities for participation in the citizen – state interface.⁸

⁶ TI, Global Corruption Barometer 2013

⁷ Data from Land matrix <http://landportal.info/landmatrix> (October 2013)

⁸ Promises, Power, and Poverty“. 170 Oxfam Briefing Paper, April 2013



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Land conflicts, too, can become engines of change if they lead to massive protest and consequent changes in policies and their implementation. It is therefore important to deal with land conflicts in a constructive manner, instead of ignoring them or simply trying to stop them. In any event, conflict theorists agree that conflict is unavoidable for any society: “Conflict is an inevitable aspect of human interaction, an unavoidable concomitant of choices and decisions. [...] Conflict can be prevented on some occasions and managed on others, but resolved only if the term is taken to mean the satisfaction of apparent demands rather than the total eradication of underlying sentiments, memories, and interests. Only time really resolves conflicts, and even the wounds it heals leave their scars for future reference. But short of such ultimate healing, much can be done to reduce conflict and thereby release needed energies for more productive tasks.”⁹

GHANA

Ghana is an agrarian economy with a total land mass of about 238,540 sq. km and an estimated population of 24million people. Agriculture contributes about 36% of Gross Domestic Product (GDP) and is the main source of livelihood for most Ghanaians, especially in the rural areas. To them, land is also of critical social, cultural and religious significance. It is widely regarded as a deity and a heritage won for the living by their ancestors in the various ethnic communities. The country is estimated to have about 24 million hectares of land, 57% of which are assessed to be suitable for agriculture with an estimated 54% of these agricultural lands under cultivation as of 2009 (Ahwoi, 2010). As such, only about 3% unused agricultural land exists that could be used for large scale agricultural investments. The centrality of land to national development efforts in Ghana cannot be overemphasized. Ghana has attracted considerable attention from both multinationals and local companies in the area of agricultural investments. Over 20 companies from countries like Brazil, Italy, Norway, Israel, China, Germany, the Netherlands, Belgium and India are engaged in investments, mainly for the cultivation of jatropha, on vast acres of lands in the Volta, Brong Ahafo, Ashanti, Eastern and Northern Regions of Ghana.

Ghana is characterized by a varied legal system where customary and statutory systems overlap. Almost 80% of its land is held under customary tenure, and is controlled by lineage or clan-based land-owning groups and allocated to individuals or households on a usufructuary basis. Most of Ghana’s land is held under customary tenure and is vested in chiefs, earth priests (who hold spiritual authority over land matters because of their role as the descendants of the first village settlers) or other

⁹ Zartman, I. M.: Conflict Reduction: Prevention, Management, and Resolution. In: Deng, F. M. und I. W. Zartman (ed.): Conflict Resolution in Africa. Washington 1991, pp. 299-319.



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customary authorities. Land is mainly owned communally along ethnotribal and family lines, with designated traditional authorities responsible for its management in their capacity as trustees.

The land priest, called Tindana, holds control over land ownership in most rural communities. The land priest is traditionally the community's spiritual leader. He is mandated to distribute land to members of the group, mediate land disputes and act as a link between the community and the spirits of their ancestors, who are believed to dwell in ancestral groves controlled by them.

In most parts of the country, particularly in the northern regions, women are challenged in accessing land except where there is a male guarantor, or where there is group ownership. Traditional leadership exercises strong influence over land allocation. This is a breeding ground for land corruption and serves to disenfranchise women.

Access to Justice in Ghana

In Ghana, access to justice is enshrined in various provisions of the 1992 Constitution. Article 12 demands from all absolute respect to uphold the fundamental human rights and freedoms as enshrined in the supreme law of the land, except in accordance with the procedure permitted by law.”¹⁰

A major obstacle in accessing justice in Ghana is the lack of an efficient and fully-functional court system, with few poorly resourced courts to provide efficient services to all. Moreover, there are too many protracted land cases in courts where it takes between three to five years (at the minimum) and between eight to fifteen years (maximum), to successfully resolve land disputes in court. The situation has also been characterized by high risks of corruption, abuse of human rights and justice. Consequently, most Ghanaians prefer using other alternative means of dispute resolution mechanisms rather than the formal court systems.

Chiefs and other custodians of customary lands are continuously altering existing land-use plans by leasing land for uses which are often inconsistent with the proposals of the prevailing planning policy. In some cases chiefs prepare makeshift 'plans' for fast urbanising areas without the knowledge or endorsement of the designated planning authorities.

While traditional dispute resolution systems would have been ideal in resolving land conflicts at the community level, those entrusted with land frustrate the process. Access to justice must therefore

¹⁰ Article 14(1) of the Ghana Constitution



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create avenues for accessing justice that are targeted to support the disadvantaged through the establishment of systems, processes and social agencies to facilitate the provision of justice services.

ZIMBABWE

Access to justice in Zimbabwe

The land holding rights and obligations in Zimbabwe are found in the country's four main systems of land tenure, namely the freehold (private), state land, communal and leasehold (resettlement) systems. The tenure systems impact and shape the property rights and natural resource access regimes that exist in the country. With the exception of the resettlement tenure system, the other three systems are as a result of the country's colonial heritage.

The freehold tenure system is prevalent in the commercial farming sector which consists of large scale and small scale commercial farmers and occupy about 32% of the country's land area of 39 million ha. This sector is characterized by individual land ownership. The registered land owner has exclusive property rights and full control and responsibility over the land except in some instances where some natural resources may be limited by statutory provisions.

The communal land tenure system is governed by the Communal Lands Act and is applicable to 42% of Zimbabwe's land area, where approximately 66% of the country's population resides. According to the Communal Lands Act, all communal land is vested in the State President who has powers to permit its occupation and utilisation in accordance with the Act. Communal Area inhabitants thus have usufructuary rights over communal land. Rural District Councils, on the other hand, have a dispensation to allocate land to qualified persons on behalf of the State. Resettlement areas cover 10% of the country and are a product of the post independence period targeted at relieving population pressure in communal areas and have no title.

In Zimbabwe, land remains an important economic and cultural asset for both rural and urban communities. Access to and control over land is, however, affected by various factors, including corruption. According to the Annual State of Corruption Research Series by Transparency International Zimbabwe¹¹, corruption in Zimbabwe is as a result of the current politics and the power dynamics. Politicians have a major role to play in terms of facilitating illicit land deals. In the face of massive pilferage of resources by those in power, it is the poor and marginalized communities who suffer the brunt of corruption. The situation is aggravated by the fact that institutions meant to combat and prosecute land corruption cases remain toothless, due to the power wielded by those in

¹¹ <http://tizim.org/wp-content/uploads/2016/05/Report1.pdf> (last accessed 11th October 2018)



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power. As such, land corruption thus thrives and contravenes the Constitution of Zimbabwe¹² and constitutional principles¹³ which guarantee every person the right of access to the courts, or to some other independent and impartial tribunal or forum established by law for the resolution of disputes.

There has been continuous debate with respect to traditional and informal justice systems in resolving land disputes. The main question has been whether justice can be made more accessible by encouraging such systems, or by facilitating a more collaborative approach between such systems and formal justice systems. Indeed, there have been proposals that some elements of informal justice should be incorporated into formal state processes.

Others have criticized the arrangement, with institutions asserting their position as follows:

“[T]hose who have criticized [informal traditional justice forums] as being too traditional to promote development are often too simplistic in their arguments. They are bound up in the traditional-modern dichotomy in which ‘traditional’ is equated with ‘backward’ and ‘modern’ with ‘advanced’. Development can thus only occur within a ‘modern’ framework. The main problem with this equation is that it is based on a very static view of tradition. It ignores the fact that traditions are often ‘invented’ and hence, very ‘modern’ in content.”¹⁴

A. INTERNATIONAL TREATIES

Even though the constitution provides the yardstick from which access to justice must thrive, there are international treaties providing for the right to access to justice which the three countries have an obligation to comply with. These include the following:

i. International Convention on Civil and Political Rights¹⁵

The International Convention on Civil and Political Rights (ICCPR) guarantees the right of access to the courts by stating that in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent,

¹² Section 69(3) of Zimbabwe constitution

¹³ Section 165 of the Constitution

¹⁴ Keulder, C. 1998 “Traditional leaders and rural development”, in D’EnglebronnerKolff, Hinz and Sidano (eds), Traditional Authority and Democracy in Southern Africa, Proceedings from the workshop, Traditional Authorities in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek, pp. 289-323.

¹⁵ Ratified by Kenya on 1st May, 1972



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independent and impartial tribunal established by law.¹⁶ The substantive right is similar to that in Article 50(1) of the Kenyan Constitution.¹⁷ Additionally, Article 14 of the ICCPR expressly guarantees that all persons shall be equal before the courts and tribunal. The provision may have been intended only to secure equal treatment when a person appears before a court. However, the treatment can hardly be considered equal if the majority of citizens are denied access to the means to secure and protect their land rights, as will be explained below.

ii. Universal declaration On Human Rights (UDHR)¹⁸

Like the African Charter and The ICCPR, the Universal Declaration of Human Rights recognizes access to justice and access to the courts as a human right themselves. It provides that each individual has the right in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of their rights and obligations.¹⁹ Further it states that individuals have the right to an effective remedy as determined by the courts for violation of the fundamental rights granted by him by the Constitution or by the Law.

iii. Convention on the Elimination of All forms of Discrimination against Women²⁰

Article 2(b) mandates state parties to adopt appropriate legislative and other measures, to prohibit discrimination against women; Article 2(c) obligates state parties to establish legal protection of the rights of women on an equal basis with men. Similarly, Article 15(1) state parties shall accord to women equality with men before the law. Article 15(2) further obliges state parties to accord to women in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity.

iv. Convention on the Rights of the Child

Article 16 protects a child from arbitrary or unlawful interference with his or her privacy, family, or correspondence, and unlawful attacks on his or her honour and reputation. Similarly, Article 37 further guarantees every child deprived of his or her liberty prompt access to legal and other appropriate assistance and the right to challenge the legality of such deprivation before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

¹⁶ Article 14 of the International Convention on Civil and Political Rights

¹⁷ Article 50(1) provides that; “Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body

¹⁸ Ratified on the 31st July, 1990

¹⁹ Article 10 of the Universal declaration on Human Rights

²⁰ Adopted on 18th December 1979 by the UN General Assembly



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B. REGIONAL INSTRUMENTS

i. African Charter on Human and People's Rights

Article 3 guarantees every individual equality before the law and protection of the law. Article 7 makes provision for the right to have his cause heard. This is further illustrated in Article 7(1)(a) which provides for the right to an appeal to competent national organs against acts of violating fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force. Article 7(1) (c) provides for the right to defence, including the right to be defended by counsel of one's choice.

ii. African Charter on Human and People's Rights on the Rights of Women in Africa

Article 8 provides that women and men are equal before the law and shall have the right to equal protection and benefit of the law. Article 8(a) guarantees effective access by women to judicial and legal services, including legal aid. Article 8(c) obligates state parties to establish adequate educational and other appropriate structures with particular attention to women and to sensitize everyone to the rights of women. Article 8(f) mandates reform of existing discriminatory laws and practices to promote and protect the rights of women.

iii. Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice system in Africa²¹

Through its various provisions, the declaration provides for the following:

- Section 1. Makes provision for broader definition of legal aid to include legal advice, assistance, representation, education, and mechanisms for Alternative Dispute Resolution; and to include a wide range of stakeholders, Mandates governments to give support to legal aid services.
- Section 3. Roots for provision of legal aid services at all stages of criminal justice processes.
- Section 4. Requires governments to provide legal aid to persons who have suffered in the hands of the officials in the criminal justice system to seek compensation for damages sustained.
- Sections 6 & 7 -Diversification of legal aid delivery systems as well as service providers.
- Section 8 - Encourages lawyers to undertake pro bono work.
- Section 9 - Roots for ensuring sustainability of legal aid services.
- Section 10 - Lend credence to legal literacy.

CHALLENGES IN ACCESS TO JUSTICE IN LAND MATTERS

²¹ Available at <https://jpo.wrlc.org/handle/11204/3818?show=full> (Last accessed 20th February 2019)



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The sustained implementation of constitutions in the three countries is indeed critical to ensuring the necessary raft of land reforms required to achieve sustainable peace, development and prosperity. Despite the enactment of many laws to safeguard access to justice, the law in action paints a different picture from what is well espoused in books. It thus follows that much more remains to be done to address the long existing challenges experienced by average citizens in accessing justice over land cases. More of this particularly needs to be done through a strict implementation of the laws on access to justice to the latter. There is lack of political will to do this as the main perpetrators of land injustices, are at times, in themselves, the well-connected people who wield a lot of power in society, and more so, control the means of production. As such, the injustices continue being perpetuated in society, with the under privileged groups bearing the brunt of it all.

The challenge in access to justice also lies in the lack of adequate institutional capacity of the Judiciary to effectively administer justice coupled with inadequate policies or laws (to give effect to what is provided for in law), hence making it either substantively or technically difficult to access justice in land matters. This is further exacerbated by low levels of public confidence in the Judiciary, as the system has been plagued by inefficiency, corruption, and political bias, which has resulted in the public's loss of trust in the system.²² There has also been a culture of impunity and lawlessness, characterised by defiance of court orders by violators, who are mostly affluent people, including politicians. This at times hinders enforcement of court decisions.

Special Problems of Access to Justice in Land Cases

In their quest to access justice, most vulnerable groups such as marginalised communities, persons with disabilities and senior citizens encounter immense challenges that bedevil the justice sector. These are characterised by legal, social, cultural, institutional, structural, procedural, political and economic challenges that make it either substantively or technically difficult to access justice. The complexity of some land cases requires legal expertise that can only be availed through legal representation or capacity building. Institutional weaknesses can be due to lack of autonomy and independence of the judiciary, poor standards of education and training, as well as poor accountability mechanisms and corruption. Such problems extend throughout the justice chain, and largely furl land corruption.

²² M Gainer "Transforming the courts: Judicial sector reforms in Kenya, 2011–2015" Innovations for Successful Societies (a joint programme of Princeton University's Woodrow Wilson School of Public & International Affairs and the Bobst Center for Peace & Justice), available at: <<https://successfulsocieties.princeton.edu/publications/transforming-courts-judicial-sector-reforms-kenya>> (last accessed 9 November 2018).



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In light of the gains made by constitutions of the three countries, much more remains to be done to address the challenges experienced by citizens in accessing justice over land matters.

For instance, in the case of Kenya having previously been the subject of complaints to the African Commission on Human and Peoples' Rights (ACHPR) for violating its obligations under the African Charter. The government's failure to implement some of the rulings of the Commission, point to the inadequacies of the system and willingness to address land grievances.

A more recent complaint is the Endorois case²³, involving violations resulting from the displacement of the Endorois, an indigenous community, from their ancestral lands without adequate compensation. In its decision, the ACHPR found that the government violated the rights to freedom of religion, property, health, culture and natural resources under the African Charter on Human and Peoples' Rights. The court further recommended restitution of Endorois ancestral land, recognition of the rights of ownership to the Endorois as well as compensation for the loss suffered. Sadly, the government is yet to comply with this ruling.

The Gender Dimension: Institutional and procedural obstacles²⁴

According to the United Nations Food and Agriculture Organisation (FAO) 2011, less than two per cent of the world's land is owned by women. But on a regional scale, in sub-Saharan Africa, approximately 15 per cent of land is owned by women. Women make up 43 per cent of the agricultural labour force in developing countries and are responsible for between 60 and 80 per cent of food production, yet on average, only five to 20 per cent of agricultural land is owned by women in those countries.

Women's subordinate position in society is reflected in many national legal systems.²⁵ Women and girls often face discrimination with regard to family law as well as property and inheritance rights. This can be attributed to poverty, as women are more likely than men to have limited access to resources and thus face higher levels of poverty, which subsequently hinders them from accessing justice. In a study by the Ghana Integrity Initiative (carried out by the TI National Chapter in Ghana) on Women and Corruption, almost 40% of women specified that corruption hindered their access to, and control over, land resources and therefore fundamentally impacted their livelihoods. This data shows the extent to which land corruption is an impediment to women's access and ownership of land.

²³ Ctr. for Minority Rights Dev. (KENYA) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm. 276/2003, 27th ACHPR AAR Annex (Jun 2009 - Nov 2009) Available at http://www.worldcourts.com/achpr/eng/decisions/2009.11_CMRD_v_Kenya.htm (Last accessed 20th March 2019)

²⁴ <https://www.ohchr.org/documents/HRBodies/CEDAW/AccessToJustice/ConceptNoteAccessToJustice.pdf>

²⁵ Kangas, A., Haider, H., and Fraser, E. (2014). Gender: Topic Guide. Revised edition with E. Browne. Birmingham: GSDRC, University of Birmingham, UK <https://gsdrc.org/wp-content/uploads/2015/07/gender.pdf>



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Secondly, few women are represented in male-dominated judicial and security institutions. As such, staff, including police officers and judges, can deter women from reporting land cases. Sensitive issues such as disinheritance of land are thus likely to go unreported due to fear of shame and stigma.

Third, officials involved in the administration of justice, namely prosecutors, police, lawyers and judges, may lack understanding on the sensitivities surrounding certain violations of women's land rights or even of their justiciability. As such, access to justice can be hindered by weaknesses in the operations of the police, prosecutors and entities first encountered by those seeking justice, leading to poor investigation and evidence collection.

Fourth, women are also under-represented, and sometimes excluded, in informal justice systems as decision makers are normally men, which may cause additional impediments for women using these means to access justice. Women are thus more likely to be discriminated against due to the imbalance of power and the absence of judicial safeguards, especially in land, where women often cannot obtain reparation when using mediation channels.

Fifth, certain evidentiary standards, such as corroboration requirements related to the testimony of a woman or where evidence is analysed in a gender biased manner, have detrimental impact on women's access to justice. The case is similar for gender-insensitive court procedure, long delays or inefficient administrative procedures.

Sixth, the implementation of decisions on violations of rights often presents significant difficulties, for instance due to lack of enforcement mechanisms or complex and lengthy procedures for enforcement. At times, the difficulty arises when women fail to enforce their favourable judgements (especially if against a man) as in land cases, due to the stigma associated with it.

Recommendations to address the Challenges to Access to Justice

First, the government should particularly encourage and institutionalise alternative dispute resolution to ease the backlog in courts and ensure expedient resolution of justice. There have been very least efforts to formalise these courts. As a result, there is no regulation to ensure that the proceedings before these courts conform to international law and constitutional standards of due process. There should be clearly defined structures to recognise and affect customary systems of justice, as a beneficial way to increase access to justice for all citizens.



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For instance, as much as ADR is currently recognised in Kenya, there is no framework on how to go about it. Article 67 of the constitution requires the National Land Commission ‘to encourage the application of traditional dispute resolution mechanisms in land conflicts’. This will undoubtedly ease the burden in resolving land disputes across the country.

Second, the government should use a multistakeholder approach, including collaboration with civil society and the private sector, to establish mechanisms for educating citizens on their land rights and assisting them in accessing justice. Synergy between the different legal and judicial sector actors to ensure that reforms are carried out holistically should be encouraged.

Third, there should be establishment of legislative and administrative frameworks for compliance with the objectives of human rights treaties and implementing the rulings of regional courts, such as the African Commission on Human and Peoples’ Rights.

Fourth, continued research on pertinent issues on land corruption and access to justice, civic awareness, training and capacity building of both citizens and duty bearers is critical in bridging the knowledge gaps on rights, duties and procedures.

Fifth, there should be strict and effective implementation of rules and laws to the latter, to ensure compliance.

Sixth, a functioning justice chain that is gender responsive should be encouraged, so as to take cognisance of the gender issues at play in access to justice.

Seven, there is need to sensitize chiefs and their communities about the impact of their actions in land transfers and illegal land dealings; with a view to ensuring the transparency of land transactions; and improving access to dispute resolution mechanisms. This will go a long way in preventing loss of land by communities that depend on secure land access.

Eight, a multistakeholder approach on initiatives on land adjudication and land management should be encouraged. In countries where land management issues are highly politicized (like Kenya, and Zimbabwe), there is need to engage in actual management issues boldly without political oppression.



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CONCLUSION

If the right of every person to access justice in the land sector is to be realised, then these hurdles must be addressed. This paper will thus assert the need to examine the legal, institutional reforms and progress made towards making access to justice for all a reality. The paper is framed within the nuances of Goal 16 of the Sustainable Development Goals on promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.